

Rulemaking Package

This memo summarizes public comments received on the proposed regulations associated with the “policies” contained within the Delta Plan and essential to its implementation. The attachment to this staff report consists of changes to the proposed regulations that staff is recommending, including a rationale for each recommended change. The recommended changes do not significantly alter the outcome of the policies and are consistent with previous Council direction on Delta Plan policies. This is an action item.

Review of the Rulemaking Process for the Delta Plan to Date:

The Delta Reform Act requires the Delta Stewardship Council (DSC), to adopt a “legally enforceable” Delta Plan. The Delta Plan calls the regulatory elements “policies”. They have been copied from the Delta Plan and formatted in a way to conform to the Administrative Procedures Act (APA). The APA spells out the process through which the policies of the Delta Plan become enforceable state regulations, including a review and approval by the state’s Office of Administrative Law (OAL).

The proposed regulations are based on and carry out the policies contained in the Final Draft Delta Plan. The total number of provisions in the regulations, as proposed to be modified at this meeting, exceeds the number of Delta Plan policies by two. The extra two provisions –which are commonly included in state regulations- are 1) a set of definitions required to clarify words or phrases used in the regulations, and derived largely from the Delta Plan’s glossary, and 2) a general provision regarding how the regulations are to be interpreted and applied. These draft regulations must be adopted by the Council after considering public input and then approved by the OAL before they become effective.

The proposed Rulemaking Package was submitted to OAL and posted for public review at the end of November, 2012, and included:

- Notice of Proposed Rulemaking. This document announced the availability of the rulemaking documents for review and the time and location of the public hearing. It includes a summary description of the proposed regulations.
- Proposed regulations (policies).
- Initial Statement of Reasons. This document described the purpose of each proposed regulation and how the regulation is reasonably necessary to achieve that purpose. It also discussed the benefits, reasonable alternatives considered, and the Council's reasons for selecting the proposed regulation.
- Cost Analysis. This evaluated the costs potentially imposed by the regulation, and was used to help develop the Draft Economic and Fiscal Impact Statement.

Draft Economic and Fiscal Impact Statement with explanatory attachment. This is required to be completed and submitted to the Department of Finance for its review and approval. It summarized the potential effects of the regulation on private businesses and individuals and assessed the potential fiscal impact on state and local agencies.

The Council received a briefing on these documents at its December 13, 2012 meeting. A 45-day public review and written comment period was followed by an official APA rulemaking hearing on January 24, 2013. An additional public hearing had previously been provided at a Council meeting on January 11, 2013.

All comments received were posted on the Council's website by February 6, 2013.

Today the Council is considering possible revisions to the proposed regulations in response to comments received. Potential revisions are explained in the attached matrix (Attachment 1). Under the APA, revisions that are substantial and "sufficiently related" to the original proposal must be available for public review at least fifteen days before final adoption. Consequently, if the Council chooses to make one or more of the proposed changes, an additional 15-day period must be provided for the public to comment on the changes.

Comments Received on the Rulemaking Package:

Staff received approximately 90 letters and e-mails, plus oral testimony, from agencies, organizations, and individuals. Within these, staff identified over 700 total comments on the rulemaking package. The majority of comments dealt with the proposed regulations. A relatively small number of comments related to the other rulemaking documents. Responses to all comments will be included in the Final Statement of Reasons, which – together with the modified regulations - will be presented to the Council in May. Many of the comments were related to the criteria that the Office of Administrative Law will use in its review of whether the regulation meets APA legal standards. These criteria are: authority, clarity, consistency, necessity, and non-duplication.

Examples of general, cross-cutting comments include the following.

- **The Council does not have authority to take a regulatory approach.** Staff disagrees. The Delta Reform Act (Act) requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. The Act also establishes a consistency review process and requires the Council to act as an appellate body. Moreover, the Act requires the Delta plan to be consistent with the federal Coastal Zone Management Act, which in turn requires a sufficiently comprehensive and specific enforcement capability. Therefore, the Delta Plan must be enforceable through regulations.
- **The Council does not have authority for key regulations such as WR P1 or DP P1.** Staff disagrees. The Act authorizes appropriate regulation on these topics in order to achieve the coequal goals.

- **Some regulations constitute a “taking” of property without compensation.** Staff disagrees. Delta Plan policies are reasonable and appropriate regulation of land uses. Long standing existing law governs the taking of property and provides for compensation. Nothing in the Delta Plan changes those laws.
- **Regulations affect water rights and area of origin rights.** Staff disagrees. No Delta Plan policies infringe on these rights.
- **Some regulations conflict with the authority of other state or local agencies.** Staff disagrees. Agencies commonly have concurrent jurisdiction. Moreover, the regulations recognize and incorporate appropriate coordination among agencies. Where appropriate, revisions of the regulations are proposed to avoid potential duplication of other agencies’ authorities.
- **The regulations improperly mix non-regulatory language with regulatory language.** Staff recommends some changes to make the regulations more concise and to differentiate regulatory requirements from explanations or definitions.
- **Some regulations lack clarity about what regulated entities are required to do.** In general staff disagrees. Staff has proposed clarifying revisions in a few regulations and has added definitions for clarity.

In general, most of the comments did not raise any new issues the Council had not previously considered during the course of its comprehensive development of and deliberation on the Delta Plan.

Proposed Revisions to the Draft Regulations

After reviewing all comments, staff prepared a set of proposed revisions to the draft regulations (Attachment 1). The revisions help to clarify and refine the regulatory policies, and therefore support the effective implementation of the Delta Plan.

Attachment 1 is organized in the order of the Delta Plan’s policies, followed by a glossary of definitions included in the regulations, and lastly a general provision regarding how the regulations are to be interpreted and applied. The corresponding number that will be assigned to each rule in the code of regulations is also provided. Because the staff recommends consolidating several draft regulations into fewer final rules, Attachment 1 shows both the regulation numbers proposed to be used in the final rulemaking package and, in a strike-out format, the corresponding number used in the draft package.

For each proposed change, the matrix summarizes the public comments and provides staff responses. Then, an underline/strikeout version illustrates the specific changes proposed. In some cases options are provided for Council’s consideration, with staff’s

preferred option indicated. A brief explanation and staff's rationale for the change are presented to the right of each change.

The proposed revisions represent the final stages of refinement of the policies developed in the Delta Plan.

Next Steps in the Rulemaking Process

- March 28/29 meeting: Council considers comments and staff recommended revisions to draft regulations and provides direction to staff.
- April: additional 15-day comment period for public to review and comment on revisions, if necessary.
- May Council meeting: Council considers adoption of regulations.
- May: Final rulemaking package produced and submitted to state OAL for review and approval.
- Summer/fall: Delta Plan regulations take effect upon completion of state rulemaking process.

Staff Recommendation

Staff recommends that, after the Council receives the staff's report on this matter, the Council open the public hearing on it, accept any public testimony, and after Council deliberation, direct the staff to make the changes as appropriate in the proposed rules and as soon thereafter as possible to make the revised regulations available for a 15-day review period in accordance with the Administrative Procedures Act.

List of Attachments

- Attachment 1: Matrix with staff proposed revisions to draft regulations, including summary of comments and rationale for changes
- Attachment 2: Map of areas where the feasibility of setting back levees must be evaluated pursuant to Sec 5008
- Attachment 3: Revisions to Delta Community maps including Hood, Freeport, City of Tracy and City of Lathrop
- Attachment 4: APA Process: Consideration of Public Input

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